Local 812, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (Canada Dry Distributors Association of New Jersey) *and* Local 125, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO. Case 22–CC–1077

March 29, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND RAUDABAUGH

On August 8, 1990, Administrative Law Judge Edwin H. Bennett issued the attached decision. The Respondent filed exceptions, a supporting brief, and a conditional request to reopen the hearing for further testimony. The General Counsel filed an opposition to the Respondent's request to reopen the hearing.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.[2]

1. We agree with the judge that the Respondent violated Section 8(b)(4)(i) and (ii)(A) by forcing the New Jersey distributors to bargain through the Canada Dry Distributors Association, Inc., even though they belonged to that organization for other purposes. The Respondent asserted that it picketed the distributors because they were refusing to sign a collective-bargaining agreement that, in the Respondent's view, had been negotiated on their behalf by the Association. Obviously, under the Respondent's theory, that contract could not have bound any distributor who had not agreed to be represented by the Association. As the judge found, the record does not support the Respondent's contention that the New Jersey distributors ever assented to such representation by the Association. Therefore, by picketing to force the New Jersey distributors to accept that agreement, the Respondent was, in effect, requiring them to bargain as a group rather than individually, and in so doing violated Section 8(b)(4)(A). See *Frito-Lay, Inc. v. Teamsters Local 137*, 623 F.2d 1354 (9th Cir. 1980), cert. denied 449 U.S. 1013 (1980), 449 U.S. 1112 (1981).[3]

The judge also found that the Respondent had violated Section 8(b)(4)(i) and (ii)(A) by forcing the New Jersey distributors to remain members of the Respondent. In reaching that result, the judge found that, although the literal language of Section 8(b)(4)(A) forbids only forcing employers and self-employed individuals to *join* labor organizations, that language must be read broadly as prohibiting actions aimed at forcing such individuals to *remain* members of labor organizations. In affirming the judge's finding, we agree with him that the Act's language should be construed broadly when necessary to give effect to its spirit. See, e.g., *Painters Orange Belt District Council 48 (Maloney Specialties)*, 276 NLRB 1372, 1385 (1985) (8(e) prohibition against ''entering into'' hot-cargo agreements encompasses maintaining, enforcing, and reaffirming, as well as initially executing, such agreements).

As the judge points out, the purpose of the relevant portion of Section 8(b)(4)(A) is to assure that employers and self-employed persons are free to refrain from belonging to a labor organization. Where, as here, such an employer or person wishes to terminate membership in the labor organization, and he/she is picketed to prevent that termination, such picketing falls clearly within the intended proscription of Section 8(b)(4)(A).

2. The Respondent requests that, should the complaint not be dismissed, the Board reopen the hearing and allow the Respondent to present evidence on several matters. We find no merit to the Respondent's request.

The Respondent first seeks to show that the New Jersey distributors, who are the subject of this proceed-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent alleges that the judge displayed bias both at the hearing and in his decision. We have scrutinized both the transcript of the hearing and the judge's decision, and we find no evidence of bias on the part of the judge.

We correct several inconsequential errors in the judge's decision: (1) The correct citation to *News Syndicate Co.* in part I of the decision is 164 NLRB 422 (1967). (2) The judge misstated the record when he observed in part II, par. 5 that the Respondent's business agent ''DiDio was unclear whether there is any geographical limitation to Local 812's appetite[.]'' Although DiDio did not specify the limits to the Respondent's jurisdiction, he did generally indicate that it included New York City, Long Island, upstate New York toward (but not including) Albany, and part of New Jersey. (3) The General Executive Board of the Teamsters International Union did not, at least in those terms, ''refuse[] to permit the transfer'' of the New Jersey distributors from the Respondent to Local 125, as the judge stated in part II, par. 12. Instead, it stated that it was ''awarding jurisdiction'' over the distributors to the Respondent. (4) DiDio did not testify that the New Jersey distributors were not a party to the agreement reached between the Respondent and the New York distributors, as the judge indicated in part II, par. 28. DiDio's testimony was that the Respondent's executive board discussed the fact that the New Jersey distributors were not going to *comply* with that agreement. (5) The judge inadvertently neglected to insert ''not'' between ''should'' and ''distinguish'' on the first line of par. 10 of the section entitled ''Additional Conclusions and Discussion.'' None of these errors affects our decision.

Finally, we do not rely on the judge's finding that some of the New Jersey distributors did not belong to the Canada Dry Distributors Association, Inc. because the record contains evidence to the contrary that the judge did not address.

[2] The judge inadvertently omitted the word ''transport'' from the cease-and-desist portion of his recommended Order and notice. We shall amend both the Order and the notice to supply the omitted language.

[3] Because we affirm the judge's finding of a violation on this basis, we need not address the possibility that the Respondent also violated the Act by forcing some distributors to join the Association. As we have noted, the record does not clearly establish that there were distributors who did not belong to the Association.

ing, have belonged to the Respondent at all relevant times. However, it was stipulated at the hearing, and found by the judge, that the distributors were members of the Respondent. More important, the judge found that the Respondent had violated Section 8(b)(4)(i) and (ii)(A) by forcing the distributors to *remain* members of the Respondent.[4] It thus would serve no purpose for the Respondent to prove—as all parties have implicitly recognized—that the distributors have *always* belonged to the Respondent. (For the same reason, there is no merit to the Respondent's request to show that it did not force the distributors to *join* it.)

The Respondent next seeks to demonstrate that the distributors ''desire'' the Respondent to represent them in their dealings with Canada Dry Bottling Co. That fact, if it be such, is irrelevant. Of relevance to this case are not the distributors' current ''desires,'' but their wishes in February and March 1989, when they attempted to transfer their membership from the Respondent to Teamsters Local 125 (and were picketed by the Respondent as a result).

The Respondent also seeks to prove that the Canada Dry Distributors' Association, Inc. was, at all relevant times, a multiemployer bargaining unit, and that the Respondent did not force the distributors to join the Association or any other employer association for the purposes of collective bargaining. We find no merit to this request, nor to the Respondent's allegation in its exceptions that it was denied due process of law when the judge allowed the General Counsel to amend the complaint at the hearing to allege that the distributors were forced to join the Association *for collective-bargaining purposes*. The amendment was made at the hearing session held on February 23, 1990, nearly 2 weeks before the Respondent's counsel began his case-in-chief, on March 6. The judge provided that the Respondent could recall the only witness who had already testified, if that were necessary to meet the issues raised by the General Counsel's amendment, yet the Respondent did not recall the witness. Multiemployer bargaining is consensual in nature–-it cannot be imposed on either an employer or a union without its knowledge. Thus, if the distributors actually had been members of a multiemployer unit that had a bargaining relationship with the Respondent, the Respondent should have been able to produce credible evidence to that effect. That it was unable to do so indicates merely that no such bargaining relationship existed. The Respondent was not denied due process, and will not be allowed to adduce further evidence on this subject.

Finally, the Respondent seeks to introduce unspecified evidence that, it asserts, was acquired after the close of the hearing. Section 102.48 of the Board's Rules and Regulations requires that a party moving to reopen the record state the nature of the evidence it seeks to introduce and that, if adduced and credited, the evidence would require a different result. The Respondent's request meets neither of these criteria. Accordingly, and for the reasons set forth above, the Respondent's request to reopen the hearing is denied.

[4] Contrary to the Respondent, we find that this theory was fully and fairly litigated.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, Local 812, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Insert ''transport,'' between ''to'' and ''handle'' in paragraph 1(a).

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT picket or in any other manner or by any other means engage in, or induce or encourage any individual employed by Canada Dry Bottling of New York, or any other person in commerce or in an industry affecting commerce within the meaning of the Act, to engage in a strike or refusal in the course of his employment to transport, handle, or work on any goods, articles, materials, or commodities or to perform any services; or threaten, coerce, or restrain Canada Dry Bottling of New York, the members of the Canada Dry Distributors Association of New Jersey, or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require the members of the Canada Dry Distributors Association of New Jersey or any other employer or self-employed person to join or remain a member of Local 812, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, or of the Canada Dry Distributors Association, Inc. for purposes of collective bargaining, or of any other employer organization.

WE WILL NOT apply, maintain in force, or give effect to the collective-bargaining agreements and amendments and additions thereto entered into with the Canada Dry Distributors Association of New Jersey and its constituent members effective by its terms for

the period June 1, 1987, through May 31, 1991, or to any modification, extension, supplement, or renewal of those agreements.

WE WILL reimburse all membership dues and fees with interest collected from the self-employed members of the Canada Dry Distributors Association of New Jersey subsequent to our unlawful picketing of them which commenced February 9, 1989.

WE WILL notify, in writing, the Canada Dry Distributors Association of New Jersey and each of its constituent members, that the collective-bargaining agreements and additions and amendments thereto entered into for the period June 1, 1987, through May 31, 1991, are null and void.

WE WILL NOT enforce or give effect to the agreements or to any modification, extension, supplement, or renewal thereof.

LOCAL 812, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL–CIO

Bernard Mintz, Esq., for the General Counsel.
Sidney Fox, Esq., for the Respondent.
Sanford R. Oxfeld, Esq. (Balk, Oxfeld, Mandell & Cohen), for the Charging Party.

DECISION

STATEMENT OF THE CASE

EDWIN H. BENNETT, Administrative Law Judge. Several days of hearing, which closed on March 6, 1990, were conducted in this case on a complaint which had issued on March 17, 1989, alleging that Local 812, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (Respondent or Local 812), violated Section 8(b)(i) and (ii)(A) of the Act by picketing certain New Jersey distributors of Canada Dry beverages in order to require their membership both in Respondent and in any employer association for collective-bargaining purposes. The complaint was based on a charge filed on February 16, 1989, by Local 125, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (Local 125) alleging violations of Section 8(b)(4)(A) and (B) and Section 8(e). Only the 8(b)(4)(A) allegation found its way into the complaint, and a related 8(b)(4)(A) charge by the Canada Dry Distributors Association of New Jersey was withdrawn at the hearing. Apart from whether or not the admitted picketing was for objects prohibited by the Act, further issues are whether or not these New Jersey distributors are self-employers and persons within the meaning of Section 8(b)(4)(A) of the Act and engaged in commerce subject to the Board's jurisdiction, allegations denied by Respondent in its answer.

At the hearing, Respondent alternatively asserted that a distributor is an employee of his own wholly owned corporation, an employee of both his corporation and Canada Dry or, if doing business as a sole proprietor rather than in the corporate style, an employee of Canada Dry alone. Testimony of Respondent's official, as described below, also equivocated on these issues. Accordingly, this decision will deal with the evidence relating to the complaint allegations noted as if they continue to be denied by Respondent despite a disingenuous ''concession'' in Respondent's brief that ''for the purposes of this case, [it] will concede that the distributors herein may be deemed to be self-employed persons pursuant to some of the decisions of the NLRB.''

On the entire record, including my observation of the witnesses, and after due consideration of Respondent's brief and legal arguments made by the General Counsel and the Charging Party on the record, I make the following

FINDINGS OF FACT

I. JURISDICTION

There are two separate employers, or groups of employers, involved in this case. The first of these is Canada Dry Bottling of New York (Canada Dry) a manufacturer and distributor at wholesale of bottled soft drinks with places of business in the States of New York and New Jersey. Annually, Canada Dry admittedly purchases and receives at its New Jersey facilities products, goods, and materials valued in excess of $50,000 transported directly from outside the State of New Jersey. It is further admitted by Respondent, and I find, that Canada Dry is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a person engaged in commerce within the meaning of Section 8(b)(4) of the Act.

The employers whose status as persons engaged in commerce within the meaning of Section 2(2), (6), and (7) and Section 8(b)(4)(A) of the Act is disputed are 43 New Jersey based wholesale distributors of Canada Dry beverages (listed by name in the complaint) who receive their product from Canada Dry at a distribution point located either in Carteret, Hackensack, or Whippany, New Jersey. It should be noted, there are perhaps an additional 100 or more distributors in New York City and several surrounding counties who while not directly at issue in the case will nevertheless be referred to because of possible connection to the New Jersey group.

An individual seeking to sell Canada Dry beverages (soda and beer in New York, only soda in New Jersey) purchases a distributorship usually directly from Canada Dry, although it is possible to purchase an existing route from a distributor with Canada Dry approval. A distributorship essentially has the exclusive right to sell Canada Dry products within a defined territory or route. The relationship between Canada Dry and the distributor, and the terms of the operation of that distributorship, primarily are governed by a standard form distributor's agreement entered into by both parties at the time of purchase which requires, inter alia, that the distributor operate as a corporation of which he is to be the sole stockholder. In exchange for a license fee he is awarded a specified territory in which he has exclusive rights to develop as many retail outlets as possible except for certain customers with particular needs reserved for Canada Dry. The distributor is required to service a customer at least once a week, cover his territory 5 days a week, and to wear a Canada Dry furnished uniform. The distributor's sales records are the property of Canada Dry and must be maintained at the Canada Dry premises. The relationship can be terminated by either party subject to notice provisions in the agreement, and

in Canada Dry's case, for 10 specified reasons and a repurchase of the territory at a fair market value. The agreement further recites that the distributor is an independent contractor and that neither the distributor nor his employees are employees of Canada Dry.

By custom and practice as well as the agreement,[1] a distributor has discretion to hire employees, to assist, and to substitute for the distributor while on vacation and the distributor alone is held responsible for those employees' wages, appropriate insurance coverage such as workmen's compensation and unemployment, and all terms of employment, e.g., firing, discipline, hours, etc. The New Jersey based distributors rarely, if ever, employ anyone and then only on a casual, sporadic or seasonal basis. Many New York distributors on the other hand regularly employ a helper because they, unlike their New Jersey counterparts, are permitted by law to also sell beer distributed by Canada Dry but they must use a separate truck for this purpose. In any case, Louie DiDio, business agent and recording secretary of Local 812, conceded that to the extent a distributor has employees Respondent considers them to be employees of the distributor's corporation and not of Canada Dry. In fact, in DiDio's view, the distributor also is an employee of his own corporation for certain purposes described below.

A distributor also must lease a truck and pay all the operating expenses, including normal maintenance, liability insurance, and taxes, although Canada Dry has a right to approve the lessor and truck style. The distributor regulates his hours of work, as well as those of any employees, including starting and finishing time and customer service time, subject only to the limitation imposed by virtue of Canada Dry's hours of operation at the terminal from which the distributor obtains the product. A distributor can extend his own credit to a customer and there is no evidence that Canada Dry directs, controls, supervises, or in any manner is involved in the day-to-day performance of a distributor's work in selling the Canada Dry product, the servicing of the distributor's accounts and the development of new customers. A distributor's income is derived from the commission (at present 15 percent) he receives on all sales. Control over fixed expenses, acquisition of new customers, and increasing sales to existing accounts by the distributor, are many of the factors that determine the profitability of his business.

Canada Dry ships its product from College Point, New York City, directly to its three New Jersey locations where the New Jersey distributors receive and purchase the merchandise at an average price of $9 a case. Each of these distributors purchases, on average, from 50,000 to 75,000 cases a year. Thus, at a minimum, each distributor purchases $450,000 worth of merchandise shipped to it directly in interstate commerce. The distributors, in turn, sell to their customers at $9 a case, retaining as noted, a 15-percent commission. Accounts are settled with Canada Dry on a daily basis. The record does not disclose why the purchase and resale prices are the same or to what extent a distributor can determine the latter price, although the distributor's agreement does state that Canada Dry may suggest the resale price. A determination of independent contractor status in cases similar to this one is a recurring question which the Board decides under the analytical approach reiterated in *DIC Animation City*, 295 NLRB 989, 990 (1989).

> Section 2(3) of the Act excludes ''any individual having the status of an independent contractor'' from the definition of employee. The Supreme Court in *NLRB v. United Insurance Co.*, 390 U.S. 254, 258 (1968), relied on the legislative history of the 1947 amendment to Section 2(3), and concluded that independent contractor status is to be determined by assessing ''the total factual context . . . in light of the pertinent common law agency principles.'' Among such principles is the ''right to control'' test, which the Board described in *News Syndicate Co.*, 264 NLRB 422, 423–424 (1967):
>
> > Where the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative.

A finding that the New Jersey distributors are self-employed independent contractors is supported by an overwhelming number of factors. They operate in the corporate style requiring effort and financial outlay to do so, they lease their own trucks and bear the entire cost incidental to their ownership, maintenance, and replacement, they determine their hours of work, and they can employ helpers whose supervision, wages, and cost of required insurance is entirely their responsibility. They are not paid wages but rather their renumeration depends solely on profit from commissions subject to the cost of operation. They can develop a territory and increase sales by their own devices without any significant interference or oversight by Canada Dry.

They do not have any of the traditional indicia of employee status, e.g., they are not hired, supervised, paid a wage, or work hours assigned by Canada Dry, and significantly, both Respondent and Canada Dry do not consider them to be employees, and indeed treat them as independent owners.

To the extent that Canada Dry exercises control over or influences their operations, for example by requiring a certain style truck, uniforms, advertising logo, examination of sales records, and by retaining the right to sever the relationship for certain specified causes (basically for failing to service customers or pay for merchandise) it reflects a contractual relationship generally inherent in business arrangements necessitated by the objective sought, i.e., the sale of Canada Dry products. This represents a classic example of retention over the right to control the result of the task and not its every day performance.

In accordance with well-established precedent,[2] I find the 43 New Jersey distributors named in the complaint to be

[1] The credited and undenied testimony of Allan M. Stern, attorney for the distributors, and Eugene Kelly, a New Jersey distributor, describe the distributors' operations.

[2] See, e.g., *Teamsters Local 221 (AGC) v. NLRB*, 290 NLRB 522 (1988), enfd. 899 F.2d 1238 (D.C. Cir. 1990). Independent contractor status found despite jobsite supervision of construction truckdrivers and requirements that they carry specific insurance on trucks and follow established procedures simi-

Continued

self-employed persons engaged in commerce within the meaning of Section 8(b)(4)(A) of the Act and engaged in the wholesale distribution of Canada Dry soft drink products throughout the State of New Jersey. Inasmuch as each distributor also annually purchases and receives in New Jersey in excess of $50,000 worth of said products shipped directly from outside the State, I also find that each distributor is a person and employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and subject to the Board's jurisdiction.

II. THE UNFAIR LABOR PRACTICES

A. *The Distributors' Associations*

In about October 1987 a group of distributors working both in New Jersey and in the New York City area and surrounding counties requested Attorney Stern to form a trade association that could purchase a group insurance policy to cover their vehicles. Stern testified credibly and without contradiction that he formed such association which was incorporated in New York State in December 1987. The certificate of incorporation identifies the association as the Canada Dry Distributors Association, Inc. (N.Y. Association), a nonprofit organization, whose purpose, described in a generalized fashion in the certificate of incorporation, is to advance the business interests of its members by promoting efficient and economical beverage distribution. Stern explained that the primary purpose and raison d'etre of the Association is to purchase group auto liability insurance policy providing such coverage for its individual members. There is no requirement imposed by Canada Dry, or anyone else, that a distributor be a member and only those distributors desiring the group insurance have joined. The record is unclear as to the total membership but according to Stern not all the 43 New Jersey distributors have joined. Further it also appears that some of the New York distributors also have not joined, and as best as can be ascertained from the record, total membership lies somewhere between about 100 and 125.

The Association also exists to deal, on behalf of its members, with Canada Dry concerning business problems of mutual interest. However, because the New York distributors, unlike their counterparts in New Jersey, operate two trucks and deliver beer, the former group has many separate interests and problems requiring resolution that have no relevance to the New Jersey group. Perhaps for that reason another association was organized consisting exclusively of all 43 New Jersey distributors which they called the Canada Dry Distributors Association of New Jersey (N. J. Association). In about February 1988 Stern was retained as counsel to that group and from his testimony, and that of Kelly, a New Jersey Canada Dry distributor since 1986 and a member of both Associations, the purpose of the N. J. Association was to provide a forum for the distributors to discuss problems and events pertaining to their trade and business operations. The group has no formal structure or written rules and is not an incorporated association.

The record is quite clear that neither Association is a successor to any other association of distributors, despite the bare unsupported assertion by Respondent to the contrary. Furthermore, the record does not establish that membership in either Association entails an obligation on the part of individual members to be bound in collective bargaining by group action. At most, as discussed more fully below, the Associations were utilized by its members as a convenience for dealing with Local 812 and Local 125. And, although Local 812 sought to impose a collective-bargaining agreement on individual members through the vehicle of association bargaining, a matter also dealt with in greater detail below, there is no persuasive evidence that, by agreement or practice, individual members demonstrated an unequivocal intention to be bound by group or multiemployer action in collective bargaining. In fact, the evidence is all to the contrary. Absent such finding of intent, neither Association constitutes a true multiemployer bargaining unit as that term is applied by the Board, *Council of Bagel & Bialy Bakeries*, 175 NLRB 902 (1969) (cited with approval at 434 F.2d 887 (2d Cir. 1970), a significant circumstance for jurisdictional purposes and in assessing the conduct of Local 812 in this case. Accordingly, each distributor constitutes a separate employer for purposes of collective bargaining.

B. *Local 812's Industrywide Relationship with Distributors*

Local 812 has a collective-bargaining agreement with Canada Dry covering at least the drivers and helpers employed directly by Canada Dry to transport its product to retail outlets and to the New Jersey distribution points from the bottling plant in College Point (Queens), New York. It is not clear when that relationship began but it appears from DiDio's evidence that it has existed since the early 1980s.

In addition, for a concurrent period of time, Local 812 has campaigned for collective-bargaining agreements and membership from about 750 different distributors working for the various soft drink bottlers in the industry, e.g., Canada Dry, Pepsi-Cola, Coca Cola, and 7-Up, within New York and New Jersey. DiDio was unclear whether there is any geographical limitation to Local 812's appetite but it does appear that New York City and many surrounding counties in both States are within Local 812's area of concern. DiDio was quite clear however, that it is Local 812's objective to obtain contracts from distributors not only to cover their employees, if any, but so that certain provisions of the agreement could be applied to the self-employed corporate owners if they perform any manual labor which they all do. According to DiDio, in order to protect Local 812's standards, it requires application of the pension and retirement provisions as well as the union-security provision to the owner/distributor even if there are no other employees of the corporation.

It is quite evident, however, that Local 812 has been somewhat lax over the years in securing written agreements from all the distributors but there is no doubt that with or without an up-to-date contract, Local 812 has been successful in at least having distributors maintain membership in Local 812. In fact, until the 1989 contracts involved in this proceeding, there is no evidence that any of the New Jersey distributors had ever signed a contract with Local 812, a condi-

---

lar to company drivers because of their freedom to reject particular jobs and entrepreneurial risk incident to ownership of their trucks. See also *Operating Engineers Local 701 (Lease Co.)*, 276 NLRB 597 (1985), where as here, the owner-operators of trucks could hire their own employees, determine their hours of operation, maintain their own equipment, and were not paid on a wage rate basis. Similarly, although the jobs involved are quite different, the contractor left the details of the job performance to the owner-operators and was predominantly concerned only with the final result, a conclusion equally applicable to Canada Dry in the instant case.

tion applicable as well to the entire membership of the N.Y. Association. Local 812 is ably assisted by Canada Dry in assuring that distributors secure and retain union membership by requiring that prospective distributors, as a condition of acquiring a route, execute a document attesting to the existence of a collective-bargaining agreement with Local 812 and authorizing Canada Dry to collect from the distributor on a daily basis, moneys to cover pension, welfare, and Local 812 dues obligated under that agreement, and to transmit such moneys to Local 812 monthly. Since distributors also settle accounts with Canada Dry on a daily basis, the moneys in effect are deducted from a distributor's commission. According to Stern, who has represented many distributors at their closings with Canada Dry, this is a standard practice and essentially entails an acknowledgment by Canada Dry that the prospective distributor has been ''cleared'' by Local 812.

In view of the fact that there is scant evidence of actual past collective-bargaining agreements with distributors (certainly none with the more than 100 distributors in the N.Y. Association), and the fact that many distributors do not have employees who might be covered by such agreements (certainly true for all the 43 New Jersey distributors) and the fact that such agreements are meaningful only because Local 812 insists that a distributor is an employee of his own wholly owned corporation, it is inescapable that Local 812's practice, goal, and policy, for almost a 10-year period, has been to unionize the owners of the distributorships in the soft drink industry, an objective in which Canada Dry has been instrumental in helping to achieve.

C. *The Union Membership of the New Jersey Distributors*

It is conceded that all the New Jersey distributors had acquired membership in Local 812 for substantial periods of time prior to the events of this case. Some distributors became members by transferring from another Teamsters' Local in about 1980–1981 under circumstances not entirely clear, while others became members simultaneously with acquiring a distributorship under circumstances and in the fashion, all too clear, previously described.

Nevertheless, in about July 1988 all the New Jersey distributors embarked on a course of action designed to free themselves from Respondent's membership hold and to transfer their allegiance to Local 125, a New Jersey Teamsters union, a journey leading to the heart of this case. Stern, as counsel to the N. J. Association, was requested to arrange for membership in that union for the Association members. Eventually, a meeting was held on January 4, 1989, at Local 125's office in Totowa, New Jersey, attended by Stern, the president and vice president of Local 125, Charles Giordano, and Richard Rabin, respectively, and five distributors who were directors of the N. J. Association including its president, Steven O'Donnel. The participants discussed Local 125's health and pension programs and the desire of the distributors to join Local 125 in order to obtain those benefits.

A second meeting was held on February 6, 1989, with the same persons present augmented by about an additional 10 distributors so that 4 or 5 distributors from each of the three Canada Dry locations in New Jersey were present. A collective-bargaining agreement with Local 125 was executed by all the distributors present each of whom also agreed to return to their respective plants and obtain the signatures of the remaining distributors, which, in fact, was done. By these agreements, the N. J. Association, and its subscribing members, recognized Local 125 as the representative of all employees, including drivers and helpers, of each subscribing member. The agreement (a brief two pages) contains, inter alia, provisions for union-security and medical benefits and is for the period February 6, 1989, to February 6, 1992.

Concurrent with these negotiations, the New Jersey distributors also were proceeding to effect a transfer of their membership from Local 812 to Local 125. In the fall of 1988, Giordano, having been informed by the distributors of their desires, met with Anthony Rumore, Local 812 president. According to Giordano's credited and unrefuted testimony, he told Rumore the distributors wanted to transfer into Local 125 but that Local 125 would refuse their application if they had collective-bargaining agreements with Local 812. Rumore said he had no knowledge of any such agreements and told Giordano that if in fact none existed and the distributors signed a petition requesting a transfer of membership, Respondent would ''turn them over'' to Local 125.

Giordano communicated the result of his meeting to the distributors who, on December 5, 1988, signed a petition requesting transfer of membership from Local 812 to Local 125. Three separate petitions were prepared and returned to Giordano, one containing 11 signatures of the distributors using the Whippany, New Jersey distribution warehouse of Canada Dry, one containing 26 signatures for those using the Hackensack, New Jersey warehouse and, a third containing 6 signatures of those using the Carteret, New Jersey warehouse. Shortly thereafter (about Christmas time) Giordano gave the petition to Respondent and on several occasions requested the production of any existing collective-bargaining agreements. Of course, such agreements did not exist and consequently were never produced.[3] Nevertheless, Respondent reneged on its agreement with Local 125, and resisted the transfer of membership, and brought the matter before the general executive board of the International Brotherhood of Teamsters which, in October 1989, refused to permit the transfer and supported Respondent's insistence that the distributors remain members of Local 812.

D. *Respondent's Picketing and the Events Giving Rise to Such Conduct*

It is not by coincidence that, at about the same time the distributors were seeking to escape from Local 812 membership, Local 812 commenced a drive to secure from them collective-bargaining agreements. DiDio testified that in May 1987 he had met with four Canada Dry distributors who he asserted were members of the Canada Dry Distributors Association, Inc., for purposes of negotiating a collective-bargaining agreement. According to DiDio they agreed to abide by whatever agreement Local 812 reached with a distributors association handling Pepsi-Cola products. Further, according to

[3] The General Counsel subpoenaed such collective-bargaining agreements at the hearing. After much equivocating and obfuscation by Respondent it finally was concluded that none of the 43 distributors in this case ever had a contract with Respondent either individually or as part of any association. Counsel's assertion that these distributors belonged to an association referred to as Alpha Beverage distributors and that Alpha in turn was party to a contract with Local 812 which bound these distributors, simply was not supported by any probative evidence.

DiDio, although such agreement was reached in early June 1987 the press of other union business prevented him from preparing any written contract for Canada Dry distributors until late July at which time he secured a signed brief stipulation from eight distributors who worked at a Newburgh, New York distribution warehouse adopting certain rates of commissions for route salesmen, pension contributions, and rates of pay for helpers from 1987 through 1990. It does not appear that any of these eight are members of either Association.

DiDio also prepared similar stipulations for the New York City and New Jersey distributors, gave them to a Mt. Vernon, New York distributor named Mike Variello, otherwise unidentified, who promised to, but did not, obtain the signatures of all the New York and New Jersey distributors, a group we know that exceeds 100 in number.

Certain parts of DiDio's foregoing testimony are very difficult to accept. Initially, I reject his assertion that in May 1987 he had any sort of agreement with the Canada Dry Distributors Association, Inc. inasmuch as that organization was not formed or incorporated until the fall of 1987. Apart from Stern's testimony to this effect, Respondent's own exhibit established the filing of the certificate of incorporation on September 15, 1987. Furthermore, it is of no legal significance that a member of the Association, even assuming its existence, purportedly entered into such agreement in light of my earlier finding that the Association is not a true multiemployer unit and the complete absence of any evidence even suggesting that the member was authorized to speak for anyone but himself.

All that remains then is that throughout 1987 Respondent harbored a vague notion that somehow or other Canada Dry distributors, other than the eight in Newburgh, New York, were obligated pursuant to some sort of written contractual understanding. To be sure, as noted above, there was no practical need to have an agreement with those distributors who had no employees which, at a minimum, included all 43 New Jersey distributors. It seems a fair inference that so long as the dues and other payments made on behalf of the corporate owners continued to flow, a fact guaranteed by Canada Dry's role as a collection agent for such purposes, Respondent had no cause for alarm.

Again, through most of 1988, Respondent made absolutely no attempt to obtain written collective-bargaining agreements from any member-employer of the N.Y. Association, and more particularly the New Jersey distributors involved in this case. And, Local 812 ignored the absence of such agreements despite its efforts, according to DiDio's testimony, to enforce the ''contract'' (particularly the union-security requirement) by his visiting various Canada Dry warehouses including one in New Jersey. For example, DiDio testified he told the ''entire distributor Association we were going to enforce the contract'' and in May or June 1988 he visited the Whippany, New Jersey location and attempted, unsuccessfully, to recruit a helper into membership.

It was not until December 1988 that Respondent exerted itself regarding the matter of collective-bargaining agreements with the distributors in the N.Y. Association, more than 1-1/2 years following the purported reaching of an agreement, but immediately on the heels of the attempt by the New Jersey distributors to transfer membership to Local 125. According to Stern, members of the N.Y. Association informed him of demands by Local 812 for an increase in pension contributions. Stern, believing that the predicate for such demand is a collective-bargaining agreement authorizing such payment wrote to Respondent and its attorney on December 19, 1988, and again on January 5, 1989, requesting copies of such contracts. In the second letter, Stern provided the names of 66 distributors who conduct business only in New York. On December 28, in reply to the first letter, Respondent's attorney wrote ''we do not have copies . . . of the collective-bargaining agreement,'' which, under the circumstances described here, is a statement only susceptible of one meaning, i.e., such agreement or agreements do not exist. That clear meaning thereafter directly was communicated to Stern by Respondent's counsel during the course of a civil action brought by Stern, inter alia, to compel production of an agreement.

Thus, despite Respondent's belief, not a single New York or New Jersey distributor had executed a collective-bargaining agreement embodying the terms DiDio claims were negotiated in 1987. This is not hard to comprehend inasmuch as DiDio conceded that it was not until January 1989, that the so-called 1987 agreement was prepared and drafted by Respondent. To be sure, Respondent explains this lengthy delay on the press of other business, but those activities were the usual, regular, and normal business of a union, e.g., negotiating and conducting a strike. Rather, as I have concluded, there was no urgency to secure collective-bargaining agreements from employers who have no employees or very few employees and who nevertheless continue to forward the dues, fees, and other moneys which might be due under an agreement. Having drafted a contract, DiDio explained that the first group of distributors approached for signatures was the N.Y. Association (the record does not disclose when, if ever, the balance of the 750 distributors in the soft drink industry under contract, real or otherwise, were solicited for their signatures).

To this end, in January 1989, Local 812 sent an agreement to some New York distributors who consulted Stern regarding the demand by Local 812 to sign the agreement. Local 812 cranked the pressure upwards a notch or two, when, by letter dated February 3, 1989, to Stern and all the distributors, signed by Local 812's president Rumore, Respondent called for a meeting on February 7 with the N.Y. Association's board of directors at Respondent's office. The letter advised that Canada Dry's president Dennis Berberich would be present and warned that ''picket lines will be established'' unless there is ''a satisfactory resolution'' of the ''problems'' between Local 812 and the distributors. While the problems are not defined, there can be no doubt from all previous and subsequent events, that the overriding problems were Respondent's demand for executed collective-bargaining agreements and the transfer to Local 125 by the New Jersey distributors.

A meeting was then scheduled for, and held on, February 8, 1989, at Local 812's office. Present were about eight of the New York distributors, Stern as their counsel, Berberich, and several other officials of Canada Dry and its counsel, Rumore, DiDio, and several other officials of Respondent and its counsel. Not a single New Jersey distributor was present or represented at the meeting. What transpired at that meeting is based on the credible and consistent testimony of Stern, who on this, as well as other matters impressed me

as a careful, cautious, and candid person. Furthermore, Stern's account is corroborated by the entire sequence of events both prior and subsequent to the meeting. DiDio, the only other witness to this meeting, essentially did not dispute Stern regarding material and significant matters. In any event, Stern's testimony is more reliable and coherent.

Stern immediately questioned the presence of Canada Dry to which Rumore replied that the real issue was who did Stern represent. To this Stern responded that he and the distributors present were there solely on behalf of the New York distributors and they did ''not represent the New Jersey distributors because they have already entered into an agreement in New Jersey with Local 125.'' Local 812's attorney repeated Rumore's questions and Stern repeated his answer. Rumore then posed the same question to the distributors each of whom identified himself and stated he represented the distributors at that particular plant in New York where he did business.

With these introductions out of the way Rumore said, ''He was very angry with Local 125, that they were renegades, but that they would be dealt with separately, but that he intended to made sure the parties did not leave the meeting that night without entering into a collective-bargaining agreement.'' Respondent was supported by Canada Dry's president and attorney both of whom expressed extreme displeasure with the action of the distributors and warned that their trucks would not be loaded unless they signed an agreement with Local 812. Berberich addressed two of the distributors in particular and said they would never get another Canada Dry distributorship regardless of the outcome of the meeting.

Later that night an agreement was entered into between Local 812 and the Canada Dry Distributors Association, Inc. for a term retroactive from June 1, 1987, until May 31, 1991. There are several articles worth noting including a standard union-security clause, various wage and benefit provisions, an agreement that the employers will not execute any contract relating to the ''hiring of Union help'' with any organization claiming to be a labor organization in the soft drink industry, and a statement that the contract supercedes any existing contract with any such union.

In addition, the preamble describes the parties to the agreement as Local 812 and the Canada Dry Distributors Association, Inc.; ''The Association and its members recognize'' Local 812; ''the term 'FIRM' or 'COMPANY' where used [in the contract] signifies the individual members of the Association and non-members who have signed this Agreement'' (I construe this to mean all members of the Association whether signing or not in addition to nonmembers who sign); and finally, it provides:

> *ARTICLE 44: BINDING OF AGREEMENT*: The ASSOCIATION obligates itself for all of its members that they will comply with all of the provisions of this Agreement, it being agreed and understood that the ASSOCIATION hereby contracts for and on behalf of itself and all of its members. The ASSOCIATION shall submit to the UNION a full list of its members, together with the names of the officers of such members as are corporations, and of the individual members of such as are co-partners, and shall notify the UNION of all changes in, and additions to, the list of members as they may occur.
>
> This Agreement shall be binding upon each and every FIRM with the same force and effect as if this Agreement were entered into by each FIRM individually and upon its successors and assigns.

According to DiDio, Respondent drafted the contract in January 1989 and although it contains 18 printed pages and several attachments not a single change was made prior to execution. Furthermore, there is no date appearing on the signature page but rather a false statement that it was signed ''the day and year first above written,'' a reference to the opening paragraph claiming, untruthfully as it turns out, that it was entered ''into as of the 1st day of June, 1987.''

The agreement was signed by Rumore, a distributor identified as an authorized signature for the Association and witnessed by seven Association directors. As Stern and Rumore reviewed the entire agreement Stern repeated his earlier statement that he was not representing the New Jersey distributors. Additional conversation was had after the contract was signed and among other remarks was a statement by Berberich that only the New York trucks would be loaded the following day and a comment by Rumore that he and Canada Dry, that night, had to negotiate regarding a distribution agreement in New Jersey.

According to DiDio, on conclusion of the meeting and at about 2 a.m., Respondent convened a meeting of its executive board. The board discussed the fact that the New Jersey distributors were not party to the agreement just reached with the N.Y. Association because they had absented themselves from the meeting, Stern had excluded them from the contract, and as of January 30 they had gone ''to a friendly Local.'' In addition, DiDio had met with Kelly and several other New Jersey distributors at a diner in late January 1989, probably on January 30.[4] According to Kelly, whom I credit in this regard, DiDio requested they sign the Local 812 agreement. The distributors refused on the excuse that they had signed contracts with Local 125. In fact the contracts had not yet been signed but the parties already had met for that purpose and the distributors had signed the petitions to transfer membership to Local 125, all of which was, by that time, known to Respondent. Kelly's mistake on this minor matter does not impair the credibility of his further testimony that DiDio reacted to their refusal to sign by stating that if they did not sign there would be picketing at the New Jersey branches, and the Local 812 drivers would not deliver the product to New Jersey. Although DiDio denied these remarks they are entirely consistent with all that occurred later and fit within Local 812's pattern of conduct in this case including Rumore's February 3 letter threatening all distributors with picketing. Although these remarks, which I conclude were unlawful threats, do not substantially affect the remedy for the other violations found, the conduct nevertheless is significant and deserves its own mention. Accordingly, I specifically reject DiDio's denial.

The executive board therefore decided to picket the three New Jersey branches of Canada Dry. That very same day, February 9, 1989, pickets were established at the Hacken-

[4] Kelly was unclear of the date, placing it after the signing of the Local 125 agreement on February 6 and after the signing by the New York distributors of the Local 812 agreement on February 8, but about a week before the picketing which began on February 9. Respondent places the meeting on January 30, clearly a more likely date under the circumstances.

sack, Whippany, and Carteret locations with picket signs stating ''Local 812 on strike against Canada Dry Distributors.'' The picketing ended on March 4, 1989, on execution of a collective-bargaining agreement between Local 812 and eight members of the N. J. Association. The agreement is identical to the one signed by the N.Y. Association members except that where the contract refers to the contracting party as the Association in the preamble and signatory page, the phrase ''New Jersey Distributors'' was added. According to Stern the only members who actually signed were those eight who attended the signing ceremony at Local 812's office. Apparently, however, all the others are abiding by its terms which in their case, since they do not have employees, translates to the payment of dues and other contributions on behalf of the corporate owner, a fact readily inferred from the action of the International union in rejecting their petition to transfer from Local 812 to Local 125.

In fact, on execution of the agreement on March 4, the distributors and Rumore signed a handwritten side agreement that would have voided the collective-bargaining contract in the event the International subsequently awarded ''jurisdiction over the employers that comprise the New Jersey distributors to Local 125.'' That, as we have seen, did not happen, ''jurisdiction over the employers'' was awarded to Local 812, which Union therefore was entitled by its internal union procedures to retain the agreement and require the self-employers to remain members of Respondent.

During the course of the picketing the Local 812 drivers employed by Canada Dry refused to deliver products to New Jersey, and the distributors were unable to engage in their normal business activities while incurring all of their regular expenses of operation. According to Kelly, this economic pressure caused the distributors to accede to Local 812's demand for a contract the existence of which adds absolutely nothing to the actual relationship between the parties except to guaranty the continued membership of the self-employers, inasmuch as the usual beneficiaries of a collective-bargaining agreement, i.e., employees, are nowhere to be found.

The absence of employees reduces to legal insignificance Respondent's assertion, assuming its truth, that even without an agreement the New Jersey distributors had an ongoing collective-bargaining arrangement with Local 812. In this connection, Respondent contends that Kelly's testimony demonstrates such relationship. Respondent misreads that testimony. Kelly testified that N. J. Association members primarily met with one another to discuss problems of mutual concern regarding Canada Dry. They also met with Canada Dry and at times with Local 812 to discuss ''problems'' and ''grievances'' (counsel's words) not otherwise defined, but that most of the time the problems concerned Canada Dry and ''not the Union.'' In addition, they would discuss welfare and pension payments to Local 812. This vague, generalized testimony unrelated to anything specific, and without factual detail, hardly constitutes evidence of a collective-bargaining relationship. Such evidence, however, reinforces my conclusions here that under the circumstances, Respondent's primary concern regarding these self-employers who did not have employees, was that they continue to make payments to various funds and to keep their membership intact.

Equally without merit is Respondent's argument that the New Jersey distributors by signing contracts with Local 125, demonstrated that in fact they had employees. The logic of such conclusion, in the face of overwhelming evidence to the contrary, is not persuasive. Many inferences may follow but not the one Respondent reaches. More likely, is that Local 125, no less than Local 812, was the recipient of a prehire agreement.

Additional Conclusions and Discussion

In pertinent part Section 8(b)(4)(i) and (ii)(A) of the Act makes it an unfair labor practice for a labor organization to induce employees to engage in a work stoppage or to restrain or coerce any person engaged in commerce, where in either case an object of such conduct is to force or require any employer or self-employed person to join a labor organization or to join any employer organization. The facts above establish that Local 812 engaged in conduct, i.e., the threat to picket, the picketing, and the refusal to perform services (delivering Canada Dry products from New York to New Jersey) clearly falling within the purview of conduct proscribed by 8(b)(4)(i) and (ii). The area of dispute in this case is whether or not such conduct was engaged in for either of the objects delineated. Respondent contends that in fact its conduct was solely to obtain execution of the 1987 collective-bargaining agreeaent previously negotiated and to secure adherence to its terms. It asserts further that inasauch as the distributors admittedly were meabers of both Local 812 and the N.Y. Association, Respondent's conduct could not, as a matter of law, possibly have been for an object of forcing thea ''to join'' such organizations. For the reasons that follow, I reject Respondent's factual and legal arguments and find that Respondent's conduct falls within the intendment of Section 8(b)(4)(A).

Without a detailed repetition of the chain of events set forth above, suffice to say the evidence is conclusive that not only did the New Jersey distributors never agree to the 1987 contract, none of them so much as participated in negotiations for such contract, none of them were bound to it by the action of any authorized person, and not a single one of them had a history of labor relations or previous contractual relationship with Respondent individually or as part of a multiemployer unit. Therefore, Respondent's assertion that it merely was seeking to achieve compliance with a preexisting agreement is without any factual foundation and we must look elsewhere for the purposes of Respondent's conduct and the legal consequences thereof.

Necessarily excluded from this inquiry, however, inasmuch as the matters are not encompassed by the complaint, are such issues as (1) the possible involvement of Section 8(b)(1)(A) and (2) by virtue of Respondent's securing of union-security agreements where it did not represent any employees and before any employees were hired; (2) possible violations regarding any of the New York distributors; (3) potential application of Section 8(b)(7)(C) where, as here, Respondent picketed for recognition—implicit in the contracts it obtained—at a time when the employers did not have unit employees thus precluding a petition under Section 9 of the Act; and (4) the potential for the existence of a proscribed object under Section 8(b)(4)(B) of the Act arising from the apparent refusal by Respondent to allow employees of Canada Dry to perform their regular duties of transporting beverages to New Jersey from New York and the scope of the picketing and threats to picket at Canada Dry's premises.

The evidence discloses that for about a 10-year period Respondent has sought to unionize drivers and helpers in the soft drink industry and has pursued that policy with respect to both employees of the various bottling companies as well as with the independent contractors engaged as distributors by those companies. DiDio acknowledged that over time it has secured membership from about 750 of such self-employed persons including the 43 New Jersey distributors in this case. While DiDio couched the Respondent's objective in terms of obtaining collective-bargaining agreements from the distributors, it is patently obvious, as found above, that in many cases a collective-bargaining agreement was required only as a means to ensure application of the union-security clause to the self-employed distributor.

Furthermore, as with the New Jersey group of 43, the absence of an agreement had not been an impediment to achieving this objective particularly when we consider that Respondent's task was facilitated by Canada Dry's requirement that as a condition of acquiring a distributorship an owner had to agree to a Local 812 contract. But again, the only meaning of an agreement with owners such as the New Jersey group, who do not have employees, is to compel the owner himself to abide by very limited and specific provisions including the union membership requirement.

DiDio, himself, explained that Local 812 desired contracts from self-employed distributors in order to apply to them several specific provisions, including union security, in order to protect the rights of its working members. He specifically excluded from application of the contract such matters as wages and hours, items he believed Local 812 could not lawfully negotiate with an owner for his own protection. The clear import of his testimony and the entire historical approach to the industry, is that Local 812 has had an unremitting policy to require membership of any person performing the work of delivering beverages (drivers and helpers) without exception for owners of corporations. Respondent's announced position is that such owners who work at the tools of the trade nevertheless are employees of their own corporation subject to the membership requirement of the contract.

The need for a contract to achieve this objective became urgent only when the New Jersey distributors signed contracts with Local 125 as part of their efforts to transfer to that union. It is not mere coincidence that although contracts supposedly had been reached in about June 1987, Local 812 did not even prepare a draft until January 1989, and although Local 812 purportedly had such phantom agreements with 750 distributors in the industry, the first group chosen for signature was the N.Y. Association. It is ineluctable that an object of Local 812's conduct, and not necessarily its only object, was to compel the New Jersey distributors to remain members of Respondent.

But, Respondent, pointing to the literal language of Section 8(b)(4)(A), argues that only conduct proscribed is that which compels a self-employed person ''to join'' a union. Such argument has only a superficial appeal. It is a familiar maxim of statutory interpretation, particularly of this Act, that the intent of Congress is not to be gleaned alone from the literal language of the statute but from its spirit. *National Woodwork Mfrs. v. NLRB*, 386 U.S. 612, 619 (1967), and such is the case here. In *Associated Musicians of Greater New York Local 802 (Ben Cutler)*, 176 NLRB 198 (1969), enfd. 422 F.2d 850 (2d Cir. 1970), the union had a policy to unionize all band leaders regardless of the fact that such policy also was directed to employers, a policy similar to Respondent's stated policy to unionize all persons driving a beverage truck. A conductor in that case, Carroll, had been expelled from membership allegedly for failing to pay his employees union mandated wages. The union then engaged in conduct designed to prevent its members from working for or with Carroll on the grounds that he was an expelled member and to do so would violate union rules. Carroll sought to rejoin the union but was rejected because he would not agree to the union's terms for membership. The union's argument that it did not violate Section 8(b)(4)(A) because it refused Carroll's application for reinstatement was rejected by the Board which held that the union's action was designed to compel reinstatement into membership albeit on the union's terms. Thus, insofar as that case has application here, it is quite clear that the Act frees employers from a compulsory rejoining of a union no less than a compulsory joining. See also *Painters Local 249 (John J. Reich)*, 136 NLRB 176 (1962). There a union violated Section 8(b)(4)(A) by engaging in forbidden conduct to require a self-employed person, a former member of the union, to rejoin because, as in the instant case, that person was working with the tools of the trade.

It would be singularly inappropriate to limit the protection of Section 8(b)(4)(A) to self-employed persons from union coercion to join, to rejoin, and to reinstate membership but not to union coercion to retain membership, and I decline that invitation, for to do otherwise would permit Respondent an easy vehicle for requiring owner-drivers to become or remain members under the guise of enforcing a union-security clause contrary to the spirit of Section 8(b)(4)(A). *Teamsters Local 525 (Helkamp Construction)*, 271 NLRB 148 (1984).

It seems evident that Section 8(b)(4)(A) does not and should distinguish between nonmembers, former members, and present members in providing self-employers protection from compulsory union membership. See generally *Musicians Local 6 (Hyatt Regency)*, 298 NLRB 740 (1990), and the discussion at footnotes 4 and 5 concerning the purpose of Section 8(b)(4)(A). The illogic of first requiring a ''resignation'' in order to protect a self-employer against coerced membership is noticeably apparent here. How ironic if Respondent could escape the consequences of its actions where the very act of resignation that it would require was itself prevented by the same unlawful conduct that compelled the self-employers to remain as members. The observation by Administrative Law Judge Herlands in *McLeod v. Associated Musicians of New York*, 283 F.Supp. 176, 182 (D.C.N.Y. 1968), granting an injunction under Section 10(1) in *Musicians Local 802*, supra at 182, illuminates the fallacy of Respondent's argument here:

> Respondent must be taken to have intended the accomplishment of the obvious, immediate and direct effect of its conduct. This obvious, immediate and direct object and its obvious, immediate and direct intended effect are equatable in a casual relationship. That intended object and effect are to bring coercive pressure on Carroll in order to make him rejoin Respondent on terms acceptable to it. Respondent's ultimate objective and broader purpose is to unionize all orchestra leaders

> in order that only union members will fill the jobs of leading orchestras. The immediate object and effect *vis-a-vis* Carroll is one step toward the achievement of the ultimate objective and broader purpose *vis-a-vis* all orchestra leaders.

Similarly, in the instant case, Respondent's broader purpose is to unionize all who use the ''tools of the trade,'' be it conducting a band or delivering bottled beverages, and its conduct towards the distributors is but one step in furtherance of that objective. As was required of the Respondents in the two *Musicians* cases, supra, Respondent here also must face the music.

Finally, I reject as without any merit, the suggestion that the International union's award of ''jurisdiction'' over the distributors to Respondent rather than to Local 125 was, in Respondent's view ''entirely proper'' (R. Br.). From this argument it is implied either that the Board should defer to the International's resolution of what it has characterized as a ''jurisdictional'' dispute or that the International's ruling provides Local 812 with an immunity from the application of Section 8(b)(4) of the Act. Respondent offers no legal support for its position and I am not aware of any. It is black letter law that statutory interpretation of the Act is the province of the Board and it goes without saying that Respondent's actions are to be judged not by what its International determines is proper but by what the Act, as applied by the Board and courts, determines to be the case. A form of inverted logic would have to apply for the Board to defer to the International's ruling or hold that such ruling is a defense to conduct otherwise in violation of Section 8(b)(4)(A), where that very ruling itself may have implicated the International in the violation, a matter that need not be decided in the absence of a charge and complaint. Suffice to say the International's award in no sense legitimized Local 812's picketing. Rather, it simply confirms my view that continued membership in Local 812 was not a voluntary act on the part of the distributors but was coerced by Respondent which then received the International's blessing for its conduct.

There remains for consideration the further aspect of Section 8(b)(4)(A), namely that Respondent had the additional object of forcing the New Jersey distributors to join the N.Y. Association, an employer organization. Again, Respondent asserts it cannot be found guilty of forcing a person ''to join'' an organization to which he already belongs. To which the General Counsel replies that it is forced membership for a specific purpose, i.e., collective bargaining, that renders Respondent's action unlawful. I agree with the General Counsel as this approach is consistent with the overall purposes of the Act.

It will be recalled that the sole purpose of the N.Y. Association was to provide truck liability insurance at a group rate for those distributors who joined and to serve as a forum for other general business purposes. Until Respondent's conduct in January 1989 converting the Association into a bargaining agent it did not function in that capacity in any sense. The tactics employed by Respondent to achieve that objective with some New York members of the N.Y. Association at the time it secured execution of the collective-bargaining agreement on February 8, 1989, need not be considered here for the evidence is conclusive that the New Jersey members remained apart from that ''negotiation'' process. It also is beyond doubt that Local 812, in drafting that agreement, employed language casting the N.Y. Association in the role of a bargaining agent for all its members. Indeed, the language chosen is strongly suggestive of the creation of a multiemployer unit, awaiting only the acts of the employers evidencing an intent to be bound by such group action. In effect, Local 812 created a new organization by materially and significantly altering the purposes for which it previously existed. By coercing the New Jersey distributors to sign that agreement it evidenced an object prohibited by Section 8(b)(4)(A). By adding the further phrase ''New Jersey Distributors'' to the identification of the contracting employers, Respondent made plain its object of requiring all members of the N. J. Association to select or join the N.Y. Association as reconstituted by Respondent. In addition, Stern's unrefuted testimony was that not all the New Jersey distributors belonged to the N.Y. Association. Therefore as to those members there is unqualified evidence of prohibited object, i.e., forcing a self-employer ''to join'' an employer organization.

Moreover, even if a technical ''joining'' of a new organization was not effected, it seems apparent that by coercively requiring the self-employers to utilize an organization for collective-bargaining purposes, the statutory intent has been met. The Act generally is not concerned with, nor does it seek to regulate, employers' business dealings that do not infringe on labor relations matters. Section 1 of the Act declares it to be the policy of the United States to assure the free flow of commerce by, inter alia, encouraging collective bargaining and assuring workers the opportunity to freely organize. It would appear to follow that Congress, in enacting Section 8(b)(4)(A), surely must have intended to interdict union coercion directed at self-employers with respect to their membership in organizations, only insofar as that membership pacted on collective bargaining. If coercion for such an object, and it need not be the only object, is found then Section 8(b)(4)(A) is violated. Consequently, the fact that distributors belonged to the N.Y. Association for auto insurance purposes is not significant in assessing Local 812's object in compelling membership for collective-bargaining purposes as well. In the context of this case, mere membership does not preclude a finding of an unlawful object. Accordingly, whether Local 812's conduct is viewed as forcing the New Jersey distributors to ''join'' a new organization created by the Respondent (bearing in mind that some of them in fact did not belong to the N.Y. Association in any form), or to convert their membership in an existing organization to meet the collective-bargaining goal of Respondent, the picketing and refusal to perform services for such objects further violates Section 8(b)(4)(i) and (ii)(A).

CONCLUSIONS OF LAW

1. Canada Dry Bottling of New York is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act and a person engaged in commerce within the meaning of Section 8(b)(4)(i) and (ii)(A) of the Act.

2. The 43 Canada Dry distributors doing business in New Jersey belonging to the Canada Dry Distributors Association of New Jersey, enumerated in the complaint in this case, and each of them, is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act and a self-employed person

within the meaning of Section 8(b)(4)(i) and (ii)(A) of the Act.

3. Local 812, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is a labor organization within the meaning of Section 2(2) of the Act.

4. By picketing and by threatening to picket the aforesaid distributors and by picketing Canada Dry's premises and by refusing to perform services for that employer, Respondent has threatened, coerced, and restrained the distributors and Canada Dry and has induced and encouraged individuals employed by Canada Dry and others to refuse to perform services for their respective employers.

5. Respondent engaged in the aforesaid conduct in furtherance and enforcement of its policy requiring union membership of all distributors engaged in the delivery of bottled beverages irrespective of whether such person is an employer or self-employer, and in order to force or require the aforesaid New Jersey distributors to join and remain members of Respondent and to join or remain members, for collective-bargaining purposes, of the Canada Dry Distributors Association, Inc., an employer organization.

6. By the aforesaid acts and conduct Respondent engaged in unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(A) of the Act, which affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent violated Section 8(b)(4)(i) and (ii)(A) of the Act, I shall recommend that it cease and desist therefrom as well as take certain affirmative action designed to effectuate the purposes of the Act. Unfortunately, the General Counsel has not filed a brief or taken a position on the record concerning the parameters of the affirmative relief it deems appropriate to remedy the rather unique circumstances surrounding the violations here. Bearing in mind the need to restore the status quo ante to the degree possible, I recomend the following remedial action.

First, in light of the widespread nature of the violation affecting self-employers, and Respondent's policy to unionize all distributors in the bottled beverage industry, not only those engaged by Canada Dry, or involved in this case, it is appropriate to fashion a ''broad'' order. See *Associated Musicians of Greater New York Local 802 (Ben Cutler)*, 176 NLRB 198. Because the Board shapes remedies in order to effectuate the public purposes of the Act it is not confined to the immediate dispute. *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344 (1953).

Second, having unlawfully coerced the distributors into remaining members, Respondent shall reimburse them for all membership dues and fees collected subsequent to such unlawful action, see *Teamsters Local 814 (Santini Bros.)*, 208 NLRB 184 (1974), with interest calculated in accordance with the principles prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Third, Respondent having coerced a ''collective-bargaining'' agreement from self-employers who do not have employees in order to compel membership in both Local 812 as well as the Canada Dry Distributors Association, Inc., I shall recommend that it rescind those agreements, advise the distributors in writing that they are null and void, and that it will take no steps to maintain them in force and effect. I would be reluctant to recommend such action if any employees would be adversely effected and if Local 812 was the majority representative in a unit of employees. But the contrary is the case, a finding fully justified by this record on a matter fully litigated, notwithstanding the absence of any 8(b)(1)(A) allegations. Indeed these circumstances provide additional basis for this recommendation, for the Board should not turn a blind eye to a situation so fraught with potential harm to employees, if and when they may be hired by these distributors. To do otherwise would ignore employee rights the Act is designed to protect.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Local 812, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Picketing or in any other manner or by any other means engaging in, or inducing, or encouraging any individual employed by Canada Dry Bottling of New York, or any other person engaged in commerce or in an industry affecting commerce within the meaning of the Act, to engage in a strike or refusal in the course of his employment to handle or work on any goods, articles, materials, or commodities or to perform any services; or threatening, coercing, or restraining Canada Dry Bottling of New York, the members of the Canada Dry Distributors Association of New Jersey, or any other person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is to force or require the members of the Canada Dry Distributors Association of New Jersey or any other employer or self-employed person to join or remain a member of Teamsters Local 812 or of the Canada Dry Distributors Association, Inc. for the purposes of collective bargaining or of any other employer organization.

(b) Applying, maintaining in force, or giving effect to the collective-bargaining agreements and amendments, and additions thereto entered into with the Canada Dry Distributors Association of New Jersey and its constituent members effective by its terms for the period June 1, 1987, through May 31, 1991, or to any modification, extension, supplement, or renewal of those agreements.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reimburse all membership dues and fees collected from the self-employed members of the Canada Dry Distributors Association of New Jersey subsequent to its unlawful picketing of them which commenced February 9, 1989, with interest in the manner set forth in the remedy section of this decision.

(b) Notify, in writing, the Canada Dry Distributors Association of New Jersey and each of its constituent members, that the collective-bargaining agreements, additions, and agreements thereto entered into for the period of June 1, 1987, through May 31, 1991, are null and void and that it

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

will not enforce or give effect to the agreements or to any modification, extension, supplement, or renewal thereof.

(c) Post at its business office copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(d) Forward a sufficient number of signed copies of the notice to the Regional Director for Region 22 for posting by the Canada Dry Distributors Association of New Jersey and each of its self-employed members and by Canada Dry Bottling of New York for posting at its locations in College Point, New York, and at its New Jersey locations in Carteret, Hackensack, and Whippany, if the persons are willing to do so.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.